Supreme Court, U.S.
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No. 99-752

In The

Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

JOSE LUIS COLLAZO,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the application of a rebuttable presumption in a proceeding under the Pennsylvania Sexual Offender's Act, in which a court must make the factual determination of whether a convicted sex offender qualifies as a Sexually Violent Predator and is therefore subject to a maximum sentence of life imprisonment in excess of any sentence he/she could otherwise lawfully receive, improperly shifts the burden of proof to the offender in violation of his/her right to due process under the Fourteenth Amendment?

Answered in the affirmative by the Pennsylvania Supreme Court.

TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities iii

Opinions Below 1

Statement of Jurisdiction 2

Constitutional Provisions Involved 2

Statement of the Case 3

Reasons in Opposition to Certiorari 7

Conclusion 15

TABLE OF AUTHORITIES

Page

Federal Cases

Almendarez-Torres v. United States, ___ U.S. ___, 118 S. Ct. 1219 (1998) 9

E.B. v. Verniero, 119 F.3d 1077 (3rd Cir. 1997), *cert. denied, Verniero v. W.P.*, 522 U.S. 1110, 118 S. Ct. 1039 (1998) 14, 15

Kansas v. Hendricks, 521 U.S. 346, 117 S. Ct. 2072 (1997) 4, 13, 15

McMillan v. Pennsylvania, 477 U.S. 79, 106 S. Ct. 2411 (1986) 9, 10, 11

Schad v. Arizona, 501 U.S. 624, 111 S. Ct. 2491 (1991) 11

Specht v. Patterson, 386 U.S. 605, 87 S. Ct. 1209 (1967) 8, 9, 10, 12, 15

United States ex rel. Gerchman v. Maroney, 355 F.2d 302 (3rd Cir. 1966) 8, 10, 12

Witte v. United States, 515 U.S. 389, 115 S. Ct. 2199 (1995) 11

State Cases

Commonwealth v. Donald Francis Williams, ___ Pa. ___, 733 A.2d 593 (June 30, 1999) ..... *passim*

Commonwealth v. Dooley, 209 Pa. Super. 516, 232 A.2d 45 (1967) 8

Doe v. Poritz, 142 N.J. 1, 662 A.2d 367 (N.J., 1995) 14

Rogers v. Board of Probation and Parole, 555 Pa. 285, 724 A.2d 319 (1997) 4

OPINIONS BELOW

The July 30, 1999 Order of the Pennsylvania Supreme Court denying the Petitioner's Petition for Allowance of Appeal from a March 23, 1999 decision of the Pennsylvania Superior Court, is unpublished and has been reprinted in the Appendix of Petitioner at App. 4. *Commonwealth v. Collazo*, No. 0404 M.D. Alloc. Dkt. (Pa., July 30, 1999). The Order cites to and relies upon a prior decision, *Commonwealth v. Donald Francis Williams*, ___ Pa. ___, 733 A.2d 593 (June 30, 1999), which is reprinted in the Appendix of Petitioner at App. 41 in its unpublished form. The March 23, 1999 Judgment and Memorandum Opinion of the Pennsylvania Superior Court reversing the trial court, is unpublished and has not been reprinted by the Petitioner. *Commonwealth v. Collazo*, No. 927 Harrisburg 1998 (Pa. Super., March 23, 1999). A May 7, 1998, opinion and order of the trial court denying a claim of ineffective assistance of counsel raised by Respondent on post-sentence motion, is unpublished and has been reprinted in the Appendix of Petitioner at App. 9. *Commonwealth v. Collazo*, No. 816 C.A. 1997 (Com. Pleas York Co., May 7, 1998). A March 12, 1998 Order of the Pennsylvania Superior Court remanding an appeal by Mr. Collazo for consideration of *nunc pro tunc* post-sentence motions on the claim of ineffective assistance of counsel is unpublished, and has not been reprinted by Petitioner. *Commonwealth v. Collazo*, No. 929 Harrisburg 1997 (Pa. Super., March 12, 1998). An October 29, 1997 Opinion of the trial court declaring that Respondent's constitutional challenges have been waived, is an unpublished opinion, and has not been reprinted by Petitioner. *Commonwealth v.*

Collazo, No. 816 C.A. 1997 (Com. Pleas York Co., October 29, 1997).

STATEMENT OF JURISDICTION

On November 1, 1999, H. Stanley Rebert, Esquire, the District Attorney of York County, Pennsylvania, filed a Petition for Writ of Certiorari from the July 30, 1999, unpublished Order of the Pennsylvania Supreme Court in *Commonwealth v. Jose Luis Collazo*, No. 0404 M.D. 1999 Alloc. Dkt. (July 30, 1999), pursuant to Supreme Court Rule 10(c), 28 U.S.C. § 1257(a). Respondent's Brief in Opposition is filed within thirty days of November 1, 1999, pursuant to Supreme Court Rule 15(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Due Process Clause contained in Section 1 of the Fourteenth Amendment of the United States Constitution states as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant Pennsylvania statute, contained in Title 42, Subchapter H of the Pennsylvania Consolidated Statutes, entitled "Registration of Sexual Offenders," is

attached to the Petition For A Writ Of Certiorari at App. 95.

STATEMENT OF THE CASE

Procedural History

Respondent adopts the statement of procedural history presented by Petitioner at pages 3 to 7 ("Concise Statement Of The Case") of the Petition For A Writ Of Certiorari.

The Statute

Pennsylvania's Registration of Sexual Offenders Act, 42 Pa.C.S.A. §§ 9791 to 9799.6, provides for three major classifications: 1) Offenders; 2) Out-of-State Offenders; and 3) Sexually Violent Predators. "Offenders" are persons convicted of enumerated sex offenses that range from first degree misdemeanors to first degree felonies. Under the Act, "Offenders" must register with the state police for a period of ten years. "Out-of-State Offenders" are persons convicted of any of the same range of offenses in another state, who have had the supervision of their parole or probation transferred to Pennsylvania. Under the current version of the statute, this classification of persons is subject to public notification, in addition to the requirement of registration.

It is the third classification that has been at issue in the present case. A "Sexually Violent Predator" is a person convicted of any crime in the above range of offenses that has occurred after the passage of the Act, where a

court has subsequently determined that the offender meets the definition contained in the statute. The most significant consequence of this adjudication is set forth in Section 9799.4(a) of the Act, as follows:

> (a) **Increased mandatory maximum sentence.** – Upon the court's finding that the offender is a sexually violent predator, the offender's maximum term of confinement for any offense or conviction specified in section 9793(b) (relating to registration of certain offenders for ten years) shall be increased to the offender's lifetime notwithstanding lesser statutory maximum penalties for these offenses.

In addition, if the individual in custody is ever subsequently paroled,[1] he or she is subject to public notification and lifetime registration.

The definition of "sexually violent predator" is similar to the definition this Court dealt with in *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 2085 (1997). Under Section 9792 of the Act, the term is defined as follows:

> **"Sexually violent predator."** A person who has been convicted of a sexually violent offense as set forth in section 9793(b) (relating to registration of certain offenders for ten years) and who is determined to be a sexually violent predator under section 9794(e) (relating to designation of sexually violent predators) due to a mental abnormality or personality disorder that

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[1] In Pennsylvania the Parole Board has been given "exclusive power to grant or deny parole to a prisoner." *Rogers v. Board of Probation and Parole*, 555 Pa. 285, 289, 724 A.2d 319, 321 (1997). A prisoner has no right to appellate review from a Parole Board decision denying parole. *Id.* at 292, 724 A.2d at 323.

> makes the person likely to engage in predatory sexually violent offenses.

The definition of "mental abnormality" states:

> **"Mental abnormality."** A congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.

The term "personality disorder" is not defined in the statute. The term "predatory", however, is defined as "[a]n act directed at a stranger or at a person with whom a relationship has been established or promoted for the primary purpose of victimization." 42 Pa.C.S.A. § 9792. Finally, a "sexually violent offense" is defined as any offense listed in Subsection 9793(b) of the Act, which includes a selection of sexual offenses ranging from indecent assault as a misdemeanor in the first degree (punishable by a term of two and a half to five years), to rape as a first degree felony (punishable by a term of ten to twenty years), plus the crime of kidnapping a child (except by a parent) and certain crimes involving a minor "relating to [the production of] obscene and other sexual materials and performances."

The adjudicatory procedure established by the Act starts with an assessment and report prepared by a "State Board to Assess Sexually Violent Predators," which consists of "psychiatrists, psychologists and criminal justice experts" appointed by the Governor. 42 Pa.C.S.A. §§ 9794, 9799.3. The Board is guided in its determination by a presumption that the defendant is a "sexually violent

predator," which may be rebutted by clear and convincing evidence, although "[t]he offender does not participate in the assessment proceeding by the Board," *Williams, supra,* 733 A.2d at 596. The Act declares:

> (b) **Presumption.** – An offender convicted of any offense set forth in section 9793(b) shall be presumed by the board and the court to be a sexually violent predator. This presumption may be rebutted by the offender by clear and convincing evidence at a hearing held in accordance with subsection (e).

42 Pa.C.S.A. § 9794(b). The court hearing referred to in subsection (e) operates as follows:

> (e) **Court review of findings.** – Upon receipt of the board's report, the court shall determine if the offender is a sexually violent predator. This determination shall be made based on evidence presented at a hearing held prior to sentencing and before the trial judge. The offender and district attorney shall be given notice of the hearing and opportunity to be heard, the right to call witnesses, the right to call expert witnesses and the right to cross-examine witnesses. In addition, the offender shall have the right to counsel and to have a lawyer appointed to represent him if he cannot afford one. After a review of all evidence presented at this hearing, the court may determine whether the presumption arising under subsection (b) has been rebutted and shall set forth this determination on the sentencing order. A copy of the sentencing order containing the determination shall be submitted

to the Pennsylvania Board of Probation and Parole and the Department of Corrections.

42 Pa.C.S.A. § 9794(e).

REASONS FOR OPPOSING THE WRIT

THE PENNSYLVANIA SUPREME COURT HAS INVOKED PRINCIPLES OF LAW REPEATEDLY ARTICULATED BY THIS COURT TO REJECT IN THIS UNIQUE STATUTE THE APPLICATION OF A REBUTTABLE PRESUMPTION IN AN ADJUDICATORY PROCEEDING USED TO DETERMINE FACTS THAT WOULD RESULT IN THE ENHANCEMENT OF PUNISHMENT FAR BEYOND THE STATUTORY MAXIMUMS THAT COULD LAWFULLY BE IMPOSED FOR THE RANGE OF CRIMINAL OFFENSES AT ISSUE HERE.

Petitioner fails to specify the precise constitutional issue it would have this Court address if its Petition For Writ Of Certiorari were granted. Within its "Statement For Reasons Allowing The Writ" the Petitioner speaks broadly about the flexible application of Due Process standards, and touches upon other constitutional issues, such as the impact of the statute upon a defendant's right against double jeopardy, and against cruel and unusual punishment. What must be at issue, however, is the holding of the Pennsylvania Supreme Court.

In that court's Order denying a Petition for Allowance of Appeal, the Pennsylvania Supreme Court cites to its recent decision in *Commonwealth v. Donald Francis Williams*, ___ Pa. ___, 733 A.2d 593 (June 30, 1999). In *Williams*, the Court focused upon the application of a

rebuttable presumption in a post-verdict adjudicatory proceeding in which it is determined whether a defendant should be declared a "Sexually Violent Predator" under the Registration of Sexual Offenders Act and subjected to a mandatory maximum sentence of life, as opposed to the lesser maximum sentence that he was eligible for under the crime of which he was convicted. The holding of the Pennsylvania Supreme Court is narrowly phrased:

> Given our view . . . that the proceeding set forth in the Act to determine whether one is a sexually violent predator is a separate factual determination, the end result of which is the imposition of criminal punishment, we hold that anything less than the full panoply of relevant protections which due process guarantees is violative of the Fourteenth Amendment. Accordingly, we find the Act's imposition of the presumption that a person convicted of a predicate offense is a sexually violent predator, and the requirement that the offender rebut the presumption, to be constitutionally repugnant.

Williams, supra, 733 A.2d at 603 (footnote omitted).

In enacting the Registration of Sexual Offenders Act, the Legislature adopted a model incorporated within a series of statutes passed during the post-World War II years, which were later struck down by this and other courts relying upon the Due Process Clause of the Fourteenth Amendment. *See Specht v. Patterson,* 386 U.S. 605, 608, 87 S.Ct. 1209 (1967) (Colorado Sex Offenders' Act); *United States ex rel. Gerchman v. Maroney,* 355 F.2d 302, 304 (3rd Cir. 1966) (Barr-Walker Act; 19 PS §§ 1166-1174); *Commonwealth v. Dooley,* 209 Pa.Super. 516, 232 A.2d 45 (1967) (Barr-Walker Act). At the time that these cases

were decided, and repeatedly thereafter, this Court described the scheme promulgated by these statutes as "a separate criminal proceeding" which was "radically different" from a mere sentencing proceeding, and within which a defendant is entitled to the full panoply of due process protections. *See Specht, supra* at 608-09, 87 S.Ct. at 1211-12; *McMillan v. Pennsylvania*, 477 U.S. 79, 89, 106 S.Ct. 2411, 2418 (1986); *Almendarez-Torres v. United States*, ___ U.S. ___, 118 S.Ct. 1219, 1230 (1998) ("the Colorado defendant in *Specht* was 'confronted with "a radically different situation" from the usual sentencing proceeding,' " quoting *Specht* and *McMillan*). Thus, in *Specht*, this Court explained:

> The Sex Offenders Act does not make the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the public. . . . That is a new finding of fact that was not an ingredient of the offense charged. The punishment under the second Act is criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting future harm.

386 U.S. at 608-09, 87 S.Ct. at 1211-12 (citation omitted).

The Pennsylvania Supreme Court reasonably and correctly interpreted Pennsylvania's statute as being like those already found constitutionally lacking. After a careful analysis of the applicable provisions of the Registration of Sexual Offenders Act, the Court declared:

> Initially, we note that the proceedings whereby one is determined to be a sexually violent predator set forth in the Act are more akin to the

> provisions found in *Specht* and *Gerchman* than the provisions at issue in *McMillan*. As in *Specht* and *Gerchman*, the determination of whether one is a sexually violent predator is a separate factual question that commences following an offender's conviction of one of the specified offenses found in the Crimes Code.

Williams, 733 A.2d at 601.

McMillan, supra, involved only a sentencing proceeding. The factor that distinguishes a hearing under the Registration of Sexual Offenders Act from the "mere sentencing proceeding" in *McMillan* is that a person convicted of any one of the predicate offenses listed in Subsection 9793(b) of the present Act cannot be sentenced to the enhanced term of life imprisonment, unless they have been separately adjudicated a Sexually Violent Predator. In *McMillan*, the defendant challenged the imposition of a five year mandatory sentence that was based upon a finding made at a sentencing hearing that he "visibly possessed a firearm" during the course of a robbery. *Id.* at 81. This Court held, by a five to four vote, that due process did not require the state to prove the visible possession of a firearm by a burden of proof greater than "a preponderance of the evidence." This Court distinguished the circumstances in *McMillan* from those in *Specht*, stating that the mandatory sentencing statute in *McMillan*

> . . . neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already

> available to it without the special finding of a visible possession of a firearm.

McMillan, supra at 87-88, 106 S.Ct. at 2417. The significance of this distinction has been repeatedly noted by this Court. *See Witte v. United States*, 515 U.S. 389, 401, 115 S.Ct. 2199, 2207 (1995); *Schad v. Arizona*, 501 U.S. 624, 644 n.9, 111 S.Ct. 2491 (1991).

The Pennsylvania Court relied upon this distinction in reaching its conclusion, since this is precisely what occurs when a person is adjudicated a "Sexually Violent Predator." *See Williams, supra*, 733 A.2d at 601. The language of the Legislature could not be more straightforward:

> § 9799.4. Sexually violent predators
>
> (a) **Increased mandatory maximum sentence.** – Upon the court's finding that the offender is a sexually violent predator, the offender's maximum term of confinement for any offense or conviction specified in section 9793(b) (relating to registration of certain offenders for ten years) shall be increased to the offender's lifetime notwithstanding lesser statutory maximum penalties for these offenses.

42 Pa.C.S.A. § 9799.4 (emphasis in original). The lesser statutory penalty applicable to the respondent's predicate offense (indecent assault as a misdemeanor in the first degree) carries a maximum sentence of five years. *See* 18 Pa.C.S.A. § 1104(1). The Pennsylvania Supreme Court had good reason to describe the Registration of Sexual Offenders Act as establishing something "radically different" from the sentencing proceeding at issue in *McMillan*. *Williams*, 733 A.2d at 602.

Despite the interpretation given to the Act by the Pennsylvania Supreme Court, the Petitioner suggests that the burden of proof at a Sexually Violent Predator hearing can be shifted to the defendant by requiring him to disprove by clear and convincing evidence that he fits the complex definition of a Sexually Violent Predator. This assertion, however, is directly contrary to the decisions of this Court that discuss this issue, starting with *Specht*. Ironically, the language that was used in *Specht* to describe the minimum procedural protections appropriate under the Colorado statute came from the decision that declared the Barr-Walker Act unconstitutional – the statute in Pennsylvania that has served as a model for the current legislation. *See Gerchman, supra*. Quoting from *Gerchman*, this Court stated:

> It is a separate criminal proceeding which may be invoked after conviction of one of the specified crimes. Petitioner therefore was entitled to a full judicial hearing before the magnified sentence was imposed. At such a hearing the requirements of due process cannot be satisfied by partial or niggardly procedural protections. A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings. He must be afforded all those safeguards which are fundamental rights and essential to a fair trial, including the right to confront and cross-examine the witnesses against him.
>
> We agree with that view.

386 U.S. at 610-11, 87 S.Ct. at 1212 (citation omitted), *quoting United States ex rel. Gerchman v. Maroney*, 355 F.2d 302, 304 (3rd Cir. 1966).

The "protections" defended by Petitioner are "niggardly" indeed. The rebuttable presumption of Section 9794(b), which requires that a defendant prove that he is not a Sexually Violent Predator by "clear and convincing evidence," is no protection at all. Indeed, although the rebuttable presumption is applied by the assessment board, the accused is deprived of any opportunity to even make rebuttal in that crucial forum. The accused may not appear before that Board, present evidence, cross-examine witnesses, or argue his case. *See Williams*, 733 A.2d at 596. He is forced to rebut the board's report at a later hearing, after the decks have been stacked against him.

The opportunity to rebut a presumption would not be a sufficient Due Process "protection" even in the context of a *Hendricks* type proceeding, where a judge's determination of fact results in a lesser deprivation of liberty – an involuntary commitment to a mental health facility. *See Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072 (1997). In contrast, here the ultimate consequence may be that a defendant is eligible for thirty or fifty years of incarceration in a penal institution, above and beyond the maximum sentence the defendant could otherwise lawfully receive. While the difference between life imprisonment and a five year term (or even a twenty year maximum sentence for the most serious predicate offense listed by this Act, 18 Pa.C.S.A. § 1103(1)) is difficult to quantify, it is easy to understand. It is a significant period of punishment, and a severe deprivation of liberty.

Moreover, the increased sentence is not the only consequence of an adjudication under the Registration of Sexual Offenders Act. Another consequence is public

notification – if the inmate is ever paroled.[2] Once a person has been adjudicated a Sexually Violent Predator, the local police are required to provide written notice of the name, address, photograph and the status of that individual as a "Sexually Violent Predator" to all persons living in his/her neighborhood, and to a wide variety of other recipients. 42 Pa.C.S.A. § 9798. Quoting from a recent decision of the Third Circuit, the Pennsylvania Supreme Court emphasized,

> that notification puts the registrant's livelihood, domestic tranquility, and personal relationships all around him in grave jeopardy. This jeopardy will not only extend to virtually every aspect of the registrant's everyday life, it will also last at least [as long as the notification continues]. As the New Jersey Supreme Court recognized in *Doe* [*v. Poritz*, 142 N.J. 1, 662 A.2d 367 (N.J., 1995)], a registrant thus has a compelling interest in an accurate and reasonable disposition of the issues before the court in a Megan's Law hearing.

Williams, supra at 606, quoting *E.B. v. Verniero*, 119 F.3d 1077, 1107 (3rd Cir. 1997), *cert. denied, Verniero v. W.P.*, 522 U.S. 1110, 118 S.Ct. 1039 (1998).

In *Verniero*, which involved a civil proceeding that dealt solely with public notification, the Third Circuit concluded that the State must prove its case by "clear and convincing evidence." *Verniero, supra* at 1111. There the fact finder was required to make a determination concerning an accused's future dangerousness; a task which

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[2] *See* footnote 1, *supra*.

the circuit court characterized as "an undertaking involving substantial uncertainty." *Id.* at 1108. Here the fact finder is required to make a similar, complex adjudication of fact; one nearly identical to that made by the civil court in *Kansas v. Hendricks, supra,* which was required to determine whether an offender had a "mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses." In upholding the statute in *Hendricks,* this Court emphasized that the Kansas Legislature had "provided strict procedural safeguards," including placing the burden upon the state to prove its case beyond a reasonable doubt. *Hendricks, supra* at 368-69, 117 S.Ct. at 2085. In light of *Specht, Hendricks* and *Verniero,* the Pennsylvania court properly rejected the suggestion that the burden of proof could be shifted and placed upon the defendant.

This Honorable Court should not grant the Petition For A Writ Of Certiorari.

CONCLUSION

For the reasons stated above, respondent respectfully requests that a writ of certiorari to review the decision below be denied.

Respectfully submitted,

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